

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

**SUNAMERICA HOUSING FUND 1050,
a Nevada limited partnership,**

Plaintiff,

v.

**HON. ARTHUR J. TARNOW
No. 19-11783**

**PATHWAY OF PONTIAC, INC., a
Michigan corporation; PV NORTH
LLC, a Michigan limited liability
company; and PRESBYTERIAN VILLAGE
NORTH, a Michigan corporation,**

Defendants.

**CROSS MOTIONS FOR SUMMARY JUDGMENT
(Held Via Videoconference)**

BEFORE DISTRICT JUDGE ARTHUR J. TARNOW
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
**Tuesday, February 2, 2021
1:23 p.m.**

APPEARANCES:

For the Plaintiff:

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KEITH E. EDEUS, JR.**
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(Appearances continued on the next page)

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MOTION HEARING

4

February 2, 2021

Detroit, Michigan

- - -

THE COURT CLERK: United States District Court for the Eastern District of Michigan is now in session; the Honorable Arthur J. Tarnow presiding. Now calling the case of SunAmerica Housing Fund 1050 versus Pathway of Pontiac Inc., et al., Case Number 19-11783.

Will counsel please make their appearances for the record.

MR. DOLAN: Yes, thank you. Good afternoon, Your Honor. My name is Louis Dolan. I'm with the law firm of Nixon Peabody appearing today from Washington, D.C. and I am here with my colleague, Keith Edeus, also from Nixon Peabody, who is appearing from our Chicago office.

THE COURT: Who are you representing?

MR. DOLAN: I represent SunAmerica 1050, a Nevada limited partnership, the plaintiff in this case, Your Honor.

THE COURT: Okay. Thank you. Welcome.

MR. DOLAN: Thank you, Your Honor.

THE COURT: Are you here by yourself or is somebody opposing you?

MR. RORAGEN: Oh, sorry, Your Honor. And good afternoon. My name is Kevin Roragen with the Loomis law firm in Lansing, Michigan and I am here representing the defendants

ARGUMENT BY MR. DOLAN

1 in this case.

2 THE COURT: And that's it?

3 MT. RORAGEN: That's --

4 THE COURT: Okay. I was confused because I had an
5 extra box on the screen but it's -- the court reporter is both
6 on video but also on the telephone so she's here two places on
7 the screen. And she's very welcome as to have the two spots
8 and I thank her for being here.

9 Now, there are cross motions. Am I right?

10 MR. DOLAN: Yes, Your Honor.

11 THE COURT: Who is going to go first?

12 MR. DOLAN: We respectfully request the opportunity to
13 be heard first as plaintiffs, Your Honor. This is Louis Dolan
14 speaking.

15 THE COURT: You may.

16 MR. DOLAN: Thank you, Your Honor.

17 We appreciate the opportunity to be heard on these
18 cross motions for summary judgment.

19 Your Honor, as I indicated at the outset, I represent
20 SunAmerica 1050 which is the limited partner owning a 99
21 percent interest, greater than 99 percent interest in the
22 limited partnership that owns the property that is at issue.

23 The general partners of that partnership are entities
24 that all, unfortunately, start with the letter P so they can be
25 a little bit confusing, but the general partners, I'll

ARGUMENT BY MR. DOLAN

1 generally refer to them as general partners, but they are
2 Pathway and PV North. They own less than 1 percent, in fact, a
3 .01 percent interest in the limited partnership --

4 THE COURT: What's their interest in selling this?
5 I'm asking you but I will also ask defense counsel. What do
6 you perceive their interest in selling it is?

7 MR. DOLAN: I'm sorry. What do I perceive what?

8 THE COURT: Why do they want to sell it? And if you
9 don't know, that's fine too. That is an appropriate answer.

10 MR. DOLAN: Your Honor, that's a very fair question.
11 They don't want -- the general partners don't want to sell the
12 property. They want to transfer it at a below-market price
13 under a right of first refusal that was not properly exercised
14 in our view to an affiliate of theirs.

15 THE COURT: Okay.

16 MR. DOLAN: So they're not looking to sell the
17 property. In fact, that is one of the cruxes of this case
18 which is that the efforts that they have been engaged in were
19 not designed to reflect a bona fide transaction of any type but
20 instead were designed to trigger under effectively false
21 pretenses --

22 THE COURT: Okay. Stop.

23 MR. DOLAN: -- right of first refusal.

24 THE COURT: The alleged purchaser is something called
25 Lockhart?

ARGUMENT BY MR. DOLAN

1 MR. DOLAN: Lockwood, Your Honor, yes.

2 THE COURT: Lockwood. What's their relationship to
3 the general and special partner, limited partner, whatever?

4 MR. DOLAN: They have no corporate relationship, if
5 that is what Your Honor means. They are an independent third
6 party that the general partners approached specifically for the
7 purpose of contriving what they call an offer.

8 THE COURT: Okay. And I'm asking this of defense
9 counsel. Is that undisputed that they were approached by the
10 general partners?

11 MR. RORAGEN: Your Honor, it's -- it is not disputed
12 that there was communication between the general -- between the
13 general partner and Lockwood in which it was -- and that the
14 general partners solicited Lockwood to make an offer to
15 purchase the property. I think it is disputed that that was
16 all done in furtherance of some scheme or contrivance, as
17 Mr. Dolan has characterized it. But --

18 THE COURT: No, no. You missed the opportunity to be
19 the first lawyer to answer a yes-or-no question with a yes or a
20 no without an explanation. I'll take that as a yes. And then
21 my question is: Is that the reason that Lockwood was not
22 deposed? Or [indiscernible] --

23 MR. RORAGEN: I don't know --

24 THE COURT: Why didn't you want to depose them?

25 MR. RORAGEN: Are you talking to defense counsel, Your

ARGUMENT BY MR. DOLAN

1 Honor, or to plaintiff's counsel?

2 THE COURT: To both of you. You can start.

3 MR. RORAGEN: Okay. I'm speaking on behalf of the
4 defendants. I do not know the reason that Mr. Lockwood wasn't
5 deposed. I would have expected him to have been deposed by
6 plaintiff's counsel. There was nothing that -- from the
7 defense perspective, we did not see a need to depose
8 Mr. Lockwood. And so I don't know --

9 THE COURT: Okay.

10 MR. RORAGEN: I'll let plaintiff's counsel --

11 THE COURT: You've answered. Let plaintiff counsel.

12 MR. DOLAN: Yes, Your Honor. Louis Dolan on behalf of
13 plaintiffs.

14 The Lockwood letter, the expression of interest, the
15 letter of intent speaks for itself. It does not constitute or
16 comprise a bona fide offer within the requirements of either
17 the partnership agreement or state law --

18 THE COURT: Okay. No, no. Please listen to the
19 question because I think both of you agree that it was not a
20 disputed fact that Lockwood made the offer and there was no
21 reason to depose him from either side. Is that a fair summary?

22 MR. DOLAN: Your Honor, on behalf of the plaintiffs,
23 it is fair except with respect to Your Honor's
24 characterization, and I say this respectfully of the term
25 "offer." It was not an offer that was capable of acceptance --

ARGUMENT BY MR. DOLAN

1 THE COURT: No, I understand the legal argument, and I
2 sit corrected as to perhaps my lack of conciseness. But the
3 point is whatever you needed from Lockwood was already a matter
4 of record and you did not feel it necessary to depose him,
5 correct?

6 MR. DOLAN: That is correct.

7 THE COURT: Okay. I'd like to start out with where
8 you guys agree and then go from there.

9 Continue with your argument, please.

10 MR. DOLAN: Okay.

11 THE COURT: Now that I've interrupted four times.

12 MR. DOLAN: Quite all right. Thank you, Your Honor.

13 As I indicated, this is a dispute over what we believe
14 to be the improper exercise of a right of first refusal.
15 Sometimes we refer to that as a ROFR. The partnership
16 agreement between the parties at Section 1703 grants a right of
17 first refusal to a third party, in this case, Presbyterian
18 Village, the ROFR holder. The grant of the right of first
19 refusal is authorized but not required under Section 42(i)(7)
20 of the Internal Revenue Code. The grant of the ROFR, right of
21 first refusal, under the partnership agreement requires by the
22 plain language of the partnership agreement, and we would
23 respectfully suggest that is not plain language that can be
24 ignored, but the plain language of the partnership agreement
25 requires that the right of first refusal can only be satisfied

1 if there is a bona fide offer from a third party. Because the
2 right of first refusal is also a well-established term of art
3 within Michigan law and within the law of every other state in
4 the country, it carries with it those common law
5 characteristics that have been decided upon in this case under
6 the state law of the State of Michigan.

7 So that leads us to two conditions with respect to the
8 right of first refusal in this instance that the defendants, in
9 their attempt to exercise it, have not satisfied. To put a
10 finer point on that, there are two specific requirements to
11 properly exercise the right of first refusal. The first is
12 that a bona fide offer from a third party be received. That
13 requirement has essentially two subparts. One is that the
14 offer itself be bona fide. That, Your Honor, means that by the
15 definition that we have all come to know in terms of what
16 bona fide means is that the offer not be filled with pretense
17 or a sham or that it be a stalking horse but that it be a
18 genuine offer solicited, right, and received by the partnership
19 and not something that is filled with pretense and designed to
20 deceive the limited partners or to trigger some third-party
21 right under the partnership agreement. And we would
22 respectfully suggest to the Court that what has happened here
23 does not meet any of the requirements of being a bona fide
24 offer. This was an offer solicited by the general partner from
25 a third party where there was absolutely no intent of the

ARGUMENT BY MR. DOLAN

11

1 general partner to accept it. There was no intent on the part
2 of the third-party offeror to complete the transaction and we
3 know that by virtue of the letter of intent, the so-called
4 offer that was received from the third-party offeror, Lockwood.

5 And, instead, what this effort was designed to do was
6 not to be genuine at all but, instead, it was designed
7 specifically for the purpose of triggering the right of first
8 refusal under the partnership agreement. So in that sense in
9 and of itself, Your Honor, this was not at all a bona fide
10 effort on the part of the general partner to solicit an offer
11 for full and fair consideration by its 99 percent limited
12 partners. In fact, this offer, right, was not even presented
13 until discovery in this case, until this federal court got
14 involved. This offer was not even presented to my clients as a
15 bona fide expression of something that the general partner
16 wanted to accomplish for the benefit of its partner and the
17 partnership. Instead, it was a sham designed solely to trigger
18 the below-market right of first refusal that the general
19 partner's affiliate, Presbyterian Village North, the right of
20 the first refusal holder, had under the partnership documents.
21 So it was not at all bona fide in that sense.

22 The other component to being a bona fide offer is the
23 word "offer," right? So there are two components to this
24 piece. One is bona fide, which I've addressed; the other is
25 offer. This instrument, this document that this third party

1 sent to the general partners, did not even meet the basic
2 requirements of being an offer, being something that if
3 accepted, would form a binding contract between the partnership
4 and the third-party offeror. So it fails with respect to the
5 plain language of the partnership agreement on both of those
6 grounds.

7 You know, there's a very important additional
8 consideration, or I would say that is consideration one, 1A and
9 1B, the bona fide nature and the fact that it did not comprise
10 an offer.

11 Point number two, Your Honor --

12 THE COURT: Wait, wait, wait. Why does it not
13 comprise an offer?

14 MR. DOLAN: Because it would not provide the certainty
15 of a contract if it were accepted.

16 THE COURT: Which elements of the contract were
17 missing?

18 MR. DOLAN: The binding nature of an agreement so that
19 this third party could excuse itself for any reason or no
20 reason at all.

21 THE COURT: Okay. Now, I'm going to stop you because
22 I'd like to hear the defense response and you'll get a chance
23 to develop the rest of your arguments as we go along.

24 MR. DOLAN: Thank you, Judge.

25 MR. RORAGEN: Thank you, Your Honor. I just want to

ARGUMENT BY MR. RORAGEN

13

1 make sure I understand the Court's request. Do you want --

2 THE COURT: I want you to respond to the argument that
3 he just made, that this was a sham and it was not bona fide and
4 it was not an offer.

5 MR. RORAGEN: Very well. Thank you, Your Honor. I
6 appreciate the clarification.

7 So, Your Honor, from the defendants' perspective, the
8 Lockwood offer clearly constitutes a bona fide offer. And that
9 an offer as defined under Michigan law with the authority cited
10 in our briefs is a manifestation of a willingness to enter into
11 a bargain such that the recipient understands that acceptance
12 is invited and will conclude the bargain.

13 THE COURT: Okay. Let me do a bit of a disclosure.
14 You may or may not have researched my background, and the
15 emphasis in any of the services that provide that to lawyers is
16 the fact that I was a criminal defense appellate lawyer. What
17 sometimes is overlooked, that I used to teach contracts at the
18 university law school level. And what the plaintiffs are
19 saying is that this is not a valid offer or a binding offer
20 because of the escape clause which says if you accept this
21 offer, I have the right to terminate any agreement for no --
22 for any reason or for no reason. So please respond to that as
23 being what I'll call a binding offer.

24 MR. RORAGEN: Thank you, Your Honor.

25 Well, first of all, the -- I would say that this is an

1 offer to purchase real estate and the provision that the
2 plaintiffs are pointing to is a section of the purchase
3 agreement, the purchase offer that is entitled Investigation
4 Period, and the language that plaintiff's counsel is referring
5 to talks about an investigation period which commences on
6 acceptance of the offer and lasts for a period of 60 days.
7 During that investigation period the purchaser has the right to
8 make whatever inquiries they think are needed with regard to
9 the property, and it states that during that investigation
10 period the purchaser -- and it has sole discretion to determine
11 whether or not the property is suitable, and it does say that
12 the purchaser could determine for any reason or no reason that
13 it does not wish to acquire the property, the purchaser can
14 terminate the agreement. That right, first of all, I would
15 say, Your Honor, that's not an unusual right to have in an
16 offer to purchase property at all. Agreements or offers to
17 purchase property are often made contingent on the purchaser's
18 right of inspection --

19 THE COURT: Well --

20 MR. RORAGEN: -- or the purchaser's rights to review
21 the property.

22 THE COURT: Let me interrupt you, which I just did.
23 The first part of what you're saying is absolutely true. If
24 there's an investigative clause, as you've described it,
25 investigation period, the whole purpose of that is to make sure

1 that there's no lien, there's no encumbrance on the property,
2 or if it's a building, there's no hidden defect that becomes
3 apparent during the investigation. However, the second part
4 that says, well, even if we don't find any defect or
5 encumbrance or any concrete [indiscernible], no pun intended,
6 then we still can terminate the agreement. Is that common in
7 the trade or am I missing something?

8 MR. RORAGEN: Your Honor, I understand what you're
9 saying but I don't think that it's -- simply because the
10 purchaser has sole discretion to determine whether there --
11 during that investigative period the property is suitable or
12 not, I don't think that that --

13 THE COURT: No, that's not what it says. It doesn't
14 say he -- or purchaser can terminate it if it's not suitable.
15 It's saying that he can terminate it for no reason at all.

16 MR. RORAGEN: Well, Your Honor, I guess I respectfully
17 would disagree with that characterization because you look at,
18 and it's paragraph 5 of the Lockwood offer, that, as I said, is
19 entitled Investigation Period, it states that during the
20 investigation period the purchaser may make such investigations
21 as purchaser considers appropriate in its sole discretion in
22 order to determine whether the property is suitable for its
23 purposes. That's, period, end of sentence.

24 The next sentence says, If purchaser --

25 THE COURT: Wait a minute. Hold on, you got a period,

ARGUMENT BY MR. RORAGEN

16

1 you got to end a sentence, you got a question. And my response
2 is implicit in that, it's not explicit, that there has to be a
3 reason that the purchaser finds that it's not suitable for
4 their purposes. So that doesn't change what we're talking
5 about, that -- if that's all there was, we wouldn't be
6 discussing it. That's perfectly appropriate, that that would
7 include a reason that it's not appropriate -- not suitable. So
8 go to your next sentence which was the one you were focusing
9 on.

10 MR. RORAGEN: Yes. The next sentence, If purchaser
11 determines for any reason or no reason that it does not wish to
12 acquire the property, purchaser will terminate this agreement.

13 THE COURT: Okay. Now --

14 MR. RORAGEN: So, now --

15 THE COURT: Let me repeat my question. Is that common
16 in these kinds of purchase offers?

17 MR. RORAGEN: I don't think that it --

18 THE COURT: That sentence.

19 MR. RORAGEN: I don't know if that particular sentence
20 is common or uncommon, Your Honor. I don't think --

21 THE COURT: Well, that's a fair answer. Let me ask
22 plaintiff attorney.

23 Mr. Dolan, do you know the answer to that question?
24 Do you see that language? And I guess I am missing a question
25 here. I'm presuming both of you do a lot of real estate work.

ARGUMENT BY MR. RORAGEN

17

1 Is that a fair conclusion on my part?

2 MR. RORAGEN: Yes.

3 MR. DOLAN: Yes, Your Honor, from --

4 THE COURT: Okay. Mr. Dolan, do you see that kind of
5 language in purported offers?

6 MR. DOLAN: No, Your Honor, it is not common. It
7 renders the instrument ephemeral and of no meaning effectively
8 because they can simply --

9 THE COURT: Is that so in case I didn't know what
10 ephemeral meant, of no meaning?

11 MR. DOLAN: Of no meaning, illusory, not worth the
12 typewritten ink it's been printed on.

13 THE COURT: Okay.

14 MR. RORAGEN: And I would disagree with that, Your
15 Honor.

16 THE COURT: What if it were toner, Mr. Dolan, and not
17 ink?

18 MR. RORAGEN: I -- if I could --

19 THE COURT: Why do you disagree?

20 MR. RORAGEN: I disagree, Your Honor, because that
21 does not render this an illusory agreement. That is the --

22 THE COURT: Wait, wait, wait. You're not disagreeing
23 with his statement that this is not a common proviso.

24 MR. RORAGEN: Oh, I'm sorry, Your Honor. I also do a
25 large amount of real estate work. I don't know if it's common

ARGUMENT BY MR. RORAGEN

18

1 or uncommon, but it's not something that I would say I've never
2 seen. I've seen this --

3 THE COURT: Okay.

4 MR. RORAGEN: -- in other agreements.

5 THE COURT: This is a bad word, assume. Did you go to
6 Catholic school?

7 MR. RORAGEN: I did not, Your Honor.

8 THE COURT: Nor did I, but I went to a play once, with
9 a purported nun, and Mr. Edeus, you know where I'm going. They
10 put on the blackboard the word "assume" and break it into three
11 parts.

12 MR. RORAGEN: Yes.

13 THE COURT: Okay?

14 MR. RORAGEN: I'm familiar, Your Honor.

15 THE COURT: Yeah. Don't rely on an assumption. If
16 you don't know, that's fine. But especially when you have a
17 person on the screen sitting next to you, the person who
18 probably does the same amount or close to the same amount of
19 real estate work and says it's rare and you're assuming its not
20 rare when you have no factual basis for that. So, in terms of
21 your argument about the legal conclusion of the impact of this
22 statement --

23 MR. RORAGEN: Yes.

24 THE COURT: -- I understand both your sides. I mean
25 you disagree as to the impact. At this point I'm leaning

ARGUMENT BY MR. RORAGEN

19

1 towards Mr. Dolan's interpretation because, well, at my age I
2 get to tell war stories and I did have a criminal case
3 involving real estate, and my client was bidding on HUD
4 housing. And it's hard to devise a system when it sold a
5 property that when the wannabe purchaser submitted an offer, I
6 did not treat it as an offer but, rather, would accept -- would
7 say, okay, you're a high bidder and we're offering to buy it
8 from you but my client, who I did not do the trial for but I
9 did the appeal, had this brilliant idea. He formed legally
10 four companies, registered them, did everything he was supposed
11 to, and he would submit bids for each company. And if HUD
12 said, okay, you're high but this other company had the second
13 high bid, he would withdraw the first one and accept HUD's
14 offer on the second one and so on. He was convicted of fraud.
15 And when I got to the Sixth Circuit to argue -- I'm pausing on
16 deciding how much to brag and not to brag because the trial
17 attorney came to me with a 50-page brief not raising
18 sufficiency of the evidence and there was a 50-page limit so I
19 had to edit his brief to make room for a sufficiency-of-the
20 evidence argument which took about two pages because it wasn't
21 fraud, he was making true statements. And there was no binding
22 offer even though HUD could have made it it, the bidder bid as
23 to be an offer. In oral argument the presiding judge in a very
24 friendly Kentucky accent said, "Counsel," and this is to the
25 U.S. Attorney, "couldn't a 16-year-old kid figure out how to

ARGUMENT BY MR. RORAGEN

20

1 work the system without committing fraud?" And I knew I had a
2 winner.

3 And an offer is an offer only if it's a definite offer
4 and that's why I'm leaning towards Mr. Dolan's position. And
5 if I were to accept Mr. Dolan's position, you have a fall-back
6 argument?

7 MR. RORAGEN: I'm sorry, Your Honor. If you were
8 accepting the position that the Lockwood --

9 THE COURT: There was not a -- forgetting getting into
10 the question of bar of fakings but, rather, just the question
11 of whether there was an offer or not. If there was no offer,
12 does that mean that a right of first refusal is not triggered
13 and your position is gone?

14 MR. RORAGEN: Your Honor, I would be -- if there is --
15 if the Court determines that there is no offer, then under that
16 circumstance I would be constrained to concede that that is a
17 triggering event for the right of first refusal under the
18 partnership agreement. As the Court's noted, I think that
19 Mr. Dolan and that the plaintiff's argument that there is no
20 offer is wrong and if the Court would indulge me, I'd just like
21 to make sure that the record is clear with regard to our
22 position on that.

23 I think that the fact that the purchase agreement or
24 the offer to purchase says that it can be terminated for any
25 reason or no reason by the purchaser, I mean that is -- has to

1 be read in the context of the investigation of the property.
2 And what the really -- the significance of is there a reason
3 for terminating under this investigative period provision is
4 does that reason have to be communicated to the seller of the
5 property, in other words, the owner of the property. And the
6 provision that says purchaser can terminate if it determines
7 for any reason or no reason at all simply is an indication that
8 no reason has to be communicated to the seller of the property
9 if the purchaser determines that the property is unsuitable for
10 purchase. That doesn't make the offer illusory, it doesn't
11 make the agreement illusory, just the same way that an at-will
12 employment is still a binding offer of employment even though
13 the employer is free to terminate employment at any time for
14 any reason or for no reason. It doesn't make that contractual
15 arrangement of employment between employer and employee
16 illusory because the employer retains that right. What that
17 right really is is the right of an employer not to have to tell
18 the employee the reason they're being terminated. And that's
19 the same thing here.

20 THE COURT: You've clarified your position. I'd like
21 Mr. Dolan to repeat in a very brief form why you feel this is
22 not a bona fide offer. You've already gone over it once but
23 just for the record and for refreshing my memory.

24 MR. DOLAN: Yes, thank you, Your Honor. Louis Dolan
25 speaking.

FURTHER ARGUMENT BY MR. DOLAN

1 This is not a bona fide offer because it is an offer
2 that was contrived under the pretense of triggering the right
3 of first refusal. There was never any intent on the part of
4 the general partner or the third party to enter into a purchase
5 and sale agreement which would be the logical next step to
6 place an --

7 THE COURT: What in the record supports that
8 conclusion?

9 MR. DOLAN: That conclusion is supported by virtue of
10 the language that we have just been referring to in the
11 so-called offer to purchase, right, which is not an offer that
12 is capable of acceptance in any meaning or way.

13 THE COURT: Okay.

14 MR. DOLAN: It's confirmed by virtue of the exhibits
15 we have attached to our summary judgment papers including, to
16 be very candid and direct with the Court, those communications
17 from Mr. Roragen to his client which have been produced in this
18 case which indicate exactly and precisely the same deficiencies
19 in this particular instrument, whatever you want to call it,
20 because it's not an offer, both with respect to the bona fide
21 nature of it because it is not bona fide in any --

22 THE COURT: As you --

23 MR. DOLAN: It is not an offer.

24 THE COURT: As you may have observed, I don't hesitate
25 to interrupt. And the interruption this time is to give me an

FURTHER ARGUMENT BY MR. DOLAN

1 exhibit letter or number that you're referring to. And take
2 your time. Take your time.

3 MR. DOLAN: We are referring to 5. On the facts of
4 this case the defendant's own counsel agreed that this offer
5 does not meet the requirements of Michigan law because it is
6 not bona fide. It is, in fact, a ruse designed solely for one
7 purpose. This is not an instrument whereby the parties are
8 getting together to say we are interested in and considering
9 purchasing your property on one side and on the other side we
10 are interested in selling you our property. This instrument is
11 a ruse designed for one purpose and one purpose only --

12 THE COURT: Are you going to answer my question? What
13 exhibit letter or number is that?

14 MR. DOLAN: I believe I'm referring to, for example,
15 Exhibit 5.

16 THE COURT: While you're looking, defense counsel,
17 Mr. Roragen, do you have any dispute with the authenticity of
18 that exhibit?

19 MR. RORAGEN: Authenticity? No, Your Honor. I have a
20 dispute with counsel's characterization of the exhibit but not
21 its authenticity.

22 THE COURT: Did he read it accurately?

23 MR. RORAGEN: No, he did not, Your Honor.

24 MR. DOLAN: I can read it for you now, Judge. May I
25 read the first sentence of it?

FURTHER ARGUMENT BY MR. DOLAN

1 THE COURT: Yes, please.

2 MR. DOLAN: I am referring to an email dated Tuesday,
3 April 2nd, 2019, at 6:59 p.m. from Mr. Kevin Roragen to
4 Mr. Ryan Carnegie, right, at his client, and then there are
5 several other recipients as well. Mr. Roragen writes,
6 "Gentlemen, I have a concern that this LOI" -- that's the
7 instrument we've been talking about. "I have concern that the
8 LOI does not meet the standard of" --

9 THE COURT: Wait, we're losing your voice.

10 MR. DOLAN: I'm sorry? I'm trying to read --

11 THE COURT: I understand.

12 MR. DOLAN: -- from my laptop. So should I start
13 over? This is an email from Mr. Roragen --

14 THE COURT: Wait a minute. Start from the beginning.
15 What exhibit letter or number is it?

16 MR. DOLAN: I am referring to our Exhibit Number 5.

17 THE COURT: Okay. Thank you. Go on.

18 MR. DOLAN: Which is an email from Mr. Roragen to his
19 client and others. His client's name is Carnegie, on Tuesday,
20 April 2nd, 2019, at 6:59 p.m. which is subject matter Re
21 Bona Fide. "Gentlemen," and I'm reading from Mr. Roragen's own
22 hand. "I have a concern that this LOI," instrument we've been
23 talking about --

24 THE COURT: Let me stop you there. Is the LOI the
25 Lockwood LOI or does it refer to a prior offer?

FURTHER ARGUMENT BY MR. DOLAN

1 MR. DOLAN: It is the Lockwood LOI. There is only one
2 that has been presented --

3 THE COURT: Wait, wait, wait. Now, I once did that at
4 a state Court of Appeals, Mr. Roragen, and was chastised for
5 that. Mr. Dolan, he was shaking his head as in disagreement.
6 And I was very young and the presiding judge was the chief
7 judge of the Court of Appeals, a -- very intimidating, and he
8 admonished me for doing that and I did it because I wasn't
9 going to get a chance for rebuttal. And I was so shamed and
10 angry at myself that when the chief judge said at the end of
11 the opposing counsel's presentation, okay, Counsel, now you can
12 go ahead and tell me why you were shaking your head, I had
13 forgotten. So don't forget. You'll get a chance to talk.

14 Mr. Dolan, you've had a chance to look and you have
15 now a very strong hint from Mr. Roragen that there was a prior
16 offer, prior to Lockwood's. But go on, Mr. Dolan. You may go
17 on.

18 MR. DOLAN: Thank you. So, Your Honor, in order --

19 MR. EDEUS: Your Honor, this is Keith Edeus. Could I
20 confer with my co-counsel or address the Court just to clarify
21 which exhibits we're talking about?

22 THE COURT: Yeah, why don't you do that. You can
23 address the Court, otherwise, it would be hard to justify why
24 you've spent all this time sitting here.

25 MR. EDEUS: Right. Your Honor, we're talking about

FURTHER ARGUMENT BY MR. DOLAN

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1 Exhibits 4 and 5 which are emails exchanged between the general
2 partner and Lockwood. Exhibit 4 is tendered for the discussion
3 that the intent of the general partner, and they're very up
4 front with Lockwood, that they're asking for an offer. And
5 while -- and I'm quoting from the -- this is a May 2, 2019
6 email. The general partner states to Lockwood, "While Lockwood
7 is formulating this, I believe we will move forward with
8 sending the LP, the limited partner, the initial LOI and let
9 them know another offer might be forthcoming. Then we will
10 next put the R-O-F-R, the ROFR, to the LP." So we cite that
11 for the proposition that general partners are advising Lockwood
12 that, in fact, they intend to use this offer as a basis to
13 exercise the ROFR.

14 Then Exhibit 5 is an email that was forwarded by the
15 general partner to Lockwood and it is discussing a prior LOI,
16 and the purpose that's disclosed here in the communication, the
17 purpose in conveying this is to share with Lockwood what that
18 offer needs to look like in order for it to trigger the ROFR.
19 So here we have the general partner coaching -- using the words
20 of their attorney to coach Lockwood as to what constitutes a
21 bona fide offer and, in particular, the binding nature of the
22 offer that's required. Those, I believe, are the two exhibits
23 that we cited, and I apologize for the interruption but --

24 THE COURT: No, you're not interrupting. You're
25 helpful. But let me ask, was the Number 4 exhibit also given

FURTHER ARGUMENT BY MR. RORAGEN

1 to Lockwood? I missed that.

2 MR. EDEUS: It was, it was. These are actually
3 documents that were obtained in discovery from Lockwood, and
4 there's been no objection made to the foundation or the
5 credibility or reliability of these documents.

6 THE COURT: Mr. Dolan, I'm going to go to Mr. Roragen
7 and see what his response is.

8 MR. DOLAN: Thank you, Your Honor. And I do apologize
9 to the Court. I stand corrected. My reasoning is the same --

10 THE COURT: No, Mr. Dolan, it's Mr. Roragen's turn.
11 And I accept your apology. It probably was not necessary.

12 But go ahead, Mr. Roragen.

13 MR. DOLAN: Thank you, Your Honor.

14 MR. RORAGEN: Your Honor, I got a little carried away
15 back there, Your Honor. I appreciate the -- I appreciate
16 your --

17 THE COURT: You're lucky I'm not a Scalia strict
18 constructionist.

19 MR. RORAGEN: Your Honor, my apologies to the Court
20 and to co-counsel.

21 THE COURT: I don't think you caught if I were a
22 strict language person, I would want you to be put on a
23 pedestal and walked out of the room, carried away.

24 MR. RORAGEN: Right.

25 THE COURT: Go ahead.

FURTHER ARGUMENT BY MR. RORAGEN

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1 MR. RORAGEN: Thank you, Your Honor.

2 I think and I appreciate Mr. Edeus' further
3 explanation which I think is -- illuminates what was going on
4 here. I point out, Your Honor, with regard to Exhibit 4, that
5 that consists of an email that refers to an initial LOI and
6 that that initial LOI that's being referred to in that email is
7 actually attached to the email and is also produced as part of
8 Exhibit 4. And that is an LOI that was, letter of intent, that
9 was actually received from a different entity not from
10 Lockwood. It's from a different entity called Michaels, and
11 the Court can view that for itself but that's part of
12 Exhibit 4.

13 Exhibit 5, as Mr. Edeus indicated, is an email, it's
14 an email thread, and really what's going on with Exhibit 5 is
15 that my client or representative of one of my client's,
16 Mr. Carnegie, was forwarding to Mark Lockwood a portion of some
17 of my advice that I had previously, about a little more than a
18 month earlier, given to my client in terms of what the standard
19 of a bona fide offer or my opinion as to that, what that would
20 entail. So I think that's what Exhibits 4 and 5 consist of.

21 I don't know, does the Court want me to further
22 address the plaintiff's arguments as to the bona fide nature of
23 the Lockwood offer at this time or would you --

24 THE COURT: No, you may address it, but it's really
25 closely tied to whether or not there was an offer at all.

FURTHER ARGUMENT BY MR. RORAGEN

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1 MR. RORAGEN: Understood, Your Honor. The only thing
2 I would address -- the only thing I would say in addition to
3 what's already been said, Your Honor, is that the plaintiffs
4 cite these two emails as evidence of some steam between
5 Lockwood and -- and the general partners of the partnership.
6 However, I don't think that these emails do evidence that.
7 There's no evidence. At best I think these emails evidence
8 that Presbyterian was not hiding the fact that it wanted
9 Lockwood to present an offer to the partnership and wasn't
10 hiding the fact that the defendants intended to exercise their
11 purchase rights under the right-of-first-refusal provision in
12 the partnership agreement.

13 There's no -- nothing in these emails or any evidence
14 in the record that shows an intent by Lockwood that Lockwood
15 would not complete the transaction. I don't know how
16 plaintiffs are arriving at that conclusion. I do think that
17 this --

18 THE COURT: What benefit would defendants have if
19 Lockwood did complete the transaction? If they brought the --
20 well, what benefit, if they had made a valid offer? Let's
21 start there.

22 MR. RORAGEN: Well, I think what the Court's asking is
23 what benefit would the defendants have if the purchase proposed
24 by Lockwood had actually been consummated --

25 THE COURT: Okay, yes.

FURTHER ARGUMENT BY MR. DOLAN

1 MR. RORAGEN: That's what I think you're asking, Your
2 Honor. And the benefit would have been the partnership would
3 have received the purchase price that was proposed,
4 5 million -- five and a quarter million dollars, and those
5 proceeds would have been distributed to the partners including
6 the general partners, my clients.

7 THE COURT: Okay. Anything else you want to say about
8 that before we go to the breach in the fiduciary duty argument?
9 Or you -- do we have to even discuss those or are your briefs
10 adequate to discuss those?

11 MR. DOLAN: Your Honor, this is Louis Dolan. If the
12 question is directed at me, I'd be happy to address that I
13 think very briefly.

14 THE COURT: Okay. Fine. Go ahead.

15 MR. DOLAN: Thank you. And I did not mean to
16 interrupt Mr. Roragen. But thank you.

17 Judge, we were talking about the requirements for
18 issuance of the right of first refusal and I'm anticipating the
19 Court may be coming close to the end of our time and so I
20 appreciate that. There's one other key point that I would like
21 to get to on that piece which is the requirement under state
22 law and under the legislative history of Section 42(i)(7) of
23 the Internal Revenue Code that the seller must be a willing
24 seller.

25 So in our view not only do the defendants here not

FURTHER ARGUMENT BY MR. DOLAN

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1 meet the requirements for a bona fide offer, they do not have a
2 willing seller and that is a very standard provision in
3 Michigan law. We have cited the cases on that. It is a
4 standard that has been now picked up in the two federal
5 district courts that have addressed this precise issue under
6 this statutory provision and it is completely missing from the
7 facts of this case. In fact, the facts of this case establish
8 that my client who owned 99.9 percent of the ownership entity
9 is not a willing seller and we said to the general partner we
10 are not interested in selling. And that, Your Honor, is a very
11 important line of demarcation or distinction between a right of
12 first refusal which is a conditional right and the conditions
13 are a bona fide offer and willingness of the seller, and an
14 option.

15 This instrument that they are attempting to exercise
16 under is not an option. They have an option that they could
17 exercise under or could have exercised under at a higher
18 purchase price, admittedly, but instead of doing that, they are
19 trying to get the lower purchase price under their right of
20 first refusal, and not only have they not met the bona fides of
21 the offer or the offer requirement, they also don't have a
22 willing seller. And the willingness of the seller has been
23 demonstrated in the record and I would cite the Court as one
24 point Exhibit Number 2 which is my February 28, 2019, letter on
25 behalf of my clients to the general partner and also, Your

FURTHER ARGUMENT BY MR. DOLAN

1 Honor, respectfully, Section 802 of the partnership agreement
2 which expressly requires the consent of the limited partner,
3 that's my client, for any sale of the property. So that piece
4 of the equation is also completely missing from any effort here
5 to exercise the right of first refusal.

6 And, Judge, I would say with that we would rely on our
7 papers with respect to the breach of fiduciary duty argument.
8 And thank you for hearing me.

9 THE COURT: Isn't the question of what -- whether or
10 not the general partners are willing sellers?

11 MR. DOLAN: Not where there is an express consent
12 provision as there is here in Section 802 and where we own 99.9
13 percent of the entity that owns the property. We are the
14 so-called majority stakeholder in this and we bargained for
15 consent rights with respect to the sale and we are not at this
16 time nor were we previously prepared to sell the property,
17 therefore, we did not at all fall into the category of a
18 willing seller which is a requirement under Michigan State law
19 as well as Section 42(i)(7) of the Internal Revenue Code.

20 And you may have picked up on Judge Dearie's -- I
21 don't know if you know Judge Dearie, but he's a senior district
22 judge in Brooklyn who ruled on these precise issues in a very
23 similar case in the Eastern District of New York and he
24 actually went, to his credit, a little bit beyond what counsel
25 did and reviewed some of the legislative history behind

FURTHER ARGUMENT BY MR. DOLAN

1 Section 42(i)(7). And in that review, and it's in his opinion
2 and we've cited his opinion, but in that review he says
3 Congress itself literally indicated, and we provided the house
4 report for the legislative history, Congress itself said there
5 has to be a willing seller. This is a right of first refusal
6 not an option. And it's important in this case, Your Honor,
7 that --

8 THE COURT: Is that -- excuse me. Is that the August
9 decision, Judge Dearie?

10 MR. DOLAN: I believe that it is. So he had two
11 decisions --

12 THE COURT: Wait, wait, wait. Stop. Do you know if
13 that has been appealed? There's --

14 MR. DOLAN: I do --

15 THE COURT: You do know?

16 MR. DOLAN: I do know.

17 THE COURT: Is it on appeal now? Because there's no
18 reported follow-up.

19 MR. DOLAN: Yes. Yes, Your Honor, it is on appeal.
20 The Notice of Appeal to the United States Court of Appeals for
21 the Second Circuit has been filed. The initial briefing on
22 that will be -- appellant's brief will be filed, assuming
23 nothing changes, on April 7th.

24 THE COURT: Okay. So it won't be argued until the
25 fall probably.

FURTHER ARGUMENT BY MR. DOLAN

1 MR. DOLAN: Probably. And I would guess there will
2 not be a decision on the appeal until probably sometime --

3 THE COURT: So I can't get out of doing something in
4 this case by saying we'll wait for that case. I mean I could
5 but it wouldn't be what you guys paid your filing fee for, you
6 know.

7 MR. DOLAN: I'm afraid that's right, Your Honor.

8 MR. RORAGEN: That is correct, sir.

9 MR. DOLAN: I also don't know whether the appeal will
10 address other issues that arose in that case, procedural issues
11 as well, so.

12 THE COURT: Okay. Mr. Roragen?

13 MR. RORAGEN: Yes. Thank you, Your Honor.

14 I believe the Court's original question had to do with
15 the breach of duty and those claims, and we'll rely on our
16 brief for that. But I'd like to respond to Mr. Dolan's
17 arguments with -- about a willing seller.

18 First of all, the partnership agreement here is to be
19 interpreted under Michigan law. Michigan law is quite clear
20 that the provisions of the partnership agreement regardless of
21 what term they use, right of first refusal or option, they have
22 to be interpreted and the rights that the parties have under
23 those agreements, they have to be interpreted according to the
24 terms and conditions that the parties agreed to. So those
25 provisions control over any common law incidence of a right of

1 first refusal here. And in this case the only triggering event
2 is the receipt of a bona fide offer. That's in Section 17.03
3 of the partnership agreement. And I know that Mr. Dolan and
4 plaintiffs point to provision 8.02 of the partnership agreement
5 which is a provision that generally requires the limited
6 partner's permission or agreement to sell the property, but
7 they conveniently ignore and have ignored throughout this case
8 that Section 8.02 of the partnership agreement, that that
9 provision has a specific carveout for the provisions of
10 Article 17 which are the right of first refusal and the option,
11 the language of the partnership agreement. This is
12 Article 8.02 subparagraph (b), small B as in boy, that says
13 "except as provided in Article 17, the general partner shall
14 not sell or otherwise dispose of any material portion of the
15 assets of the partnership without the consent of the limited
16 partner."

17 So the concept of a willing seller is not built into
18 this -- to the parties' rights as expressed in the partnership
19 agreement in Section 17 here, and the cases that are referred
20 to, I believe those are the *Risboro* and *AMTRAX* cases, those
21 federal cases, as we point out in our reply brief, Your Honor,
22 and I would just rely on the arguments we made there, that
23 those cases or the holdings in those cases actually support our
24 position that if you interpret the provisions of the
25 partnership agreement that the right of purchase here that's

FURTHER ARGUMENT BY MR. DOLAN

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1 provided for in that partnership agreement was validly
2 exercised.

3 Thank you, Your Honor.

4 THE COURT: Okay. Any last words, Mr. Dolan?

5 MR. DOLAN: Thank you, Your Honor. I would again draw
6 the Court's attention to Judge Dearie's well-reasoned opinion
7 in the *Risboro* decision in which he effectively says that
8 because this contract or statutory provision interprets a
9 well-known, well-regarded term of art, that being right of
10 first refusal, that necessarily carries with it the common law
11 requirements associated with that which include willingness of
12 seller.

13 THE COURT: Okay. Lexis says that the appeal was
14 decided on December 23rd of Judge Dearie's decision. How is
15 that -- is Lexis wrong?

16 MR. DOLAN: If the -- I'm sorry. I'm not sure I
17 understand your question, Your Honor. If the appeal were
18 terminated?

19 THE COURT: Yeah. Lexis says on December 23rd.

20 MR. DOLAN: Then I think that the judicial effect of
21 that would be that --

22 THE COURT: No, no. Factually that the dates you gave
23 me were probably from a briefing letter from the Court saying
24 your brief is due, et cetera, which was probably sent before
25 December 23rd. And if my law clerk tells me that Lexis says

MOTION TAKEN UNDER ADVISEMENT

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1 that it was terminated December 23rd, then it's a very good
2 thing that I didn't hold this in abeyance until that was
3 decided --

4 MR. DOLAN: Your Honor --

5 THE COURT: In the words of a famous song, "the
6 twelfth of never."

7 MR. DOLAN: Your Honor, here's what I can tell you
8 about that from personal knowledge which is that the appeal has
9 been docketed before the Second Circuit.

10 THE COURT: Okay.

11 MR. DOLAN: It just recently received a briefing
12 schedule whereby the other party, the party that lost in the
13 trial court before Judge Dearie, has their appellant's brief
14 due to be filed with the Second Circuit on April 7th.

15 THE COURT: What was the date of that letter? Do you
16 know?

17 MR. DOLAN: I don't have that in front of me, but it's
18 been within -- I believe it's correct to say it's been within
19 the last perhaps ten day, two weeks, something like that.

20 THE COURT: So it was after the 23rd. So Lexis may
21 have been mistaken or maybe it was reinstated? Be that as it
22 may, we'll get you a decision within 60 days.

23 MR. DOLAN: Thank you, Your Honor.

24 MR. RORAGEN: Thank you, Your Honor.

25 THE COURT: Yes. That's an enforceable offer.

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1 MR. DOLAN: Thank you, Judge.

2 THE COURT: Both doing -- all three of you and you've
3 been very helpful. It's not an easy case legally. Factually
4 it's probably not such a hard case. Thank you both, and all
5 three.

6 MR. DOLAN: Thank you.

7 MR. RORAGEN: Thank you, Your Honor.

8 (Proceedings concluded, 2:25 p.m.)

9 - - -

10 CERTIFICATION OF REPORTER

11

12 I, Leann S. Lizza, do hereby certify that the above-entitled
13 matter was taken before me remotely via videoconference at the
14 time and place hereinbefore set forth; that the proceedings
15 were duly recorded by me stenographically and reduced to
16 computer transcription; that this is a true, full and correct
17 transcript of my stenographic notes so taken; and that I am not
18 related to, nor of counsel to either party, nor interested in
19 the event of this cause.

20

21

22 S/Leann S. Lizza 3-24-2021

23 Leann S. Lizza, CSR-3746, RPR, CRR, RMR, RDR Date

24

25